APPEAL NO. 92135
FILED MAY 18, 1992

A contested case hearing was held in _____, Texas, on February 28, 1992, with (hearing officer) presiding as hearing officer. The disputed issues to be resolved were whether appellant sustained a repetitive trauma injury to her back in early (date of injury) while in the course and scope of her employment as a school bus driver, and, whether appellant timely reported such injury to her employer. The hearing officer determined that appellant proved that she had sustained a repetitive trauma injury in the course and scope of her employment. He further concluded, however, that appellant had neither given timely notice of her injury nor shown good cause for her failure so to do pursuant to the requirements of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. Arts. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). In her request for review, appellant challenges the factual sufficiency of the hearing officer's findings and to his conclusion that appellant did not provide timely notice of injury.

DECISION

We affirm. The evidence is sufficient to sustain the challenged factual findings and legal conclusion of the hearing officer.

Appellant (claimant below) testified that she had driven a school bus for the (Employer) on a part-time basis for some part of 1989 and full-time from February 1990 to the first few days in September 1991 when she quit due to pain in her left leg and lower back. She did not drive the bus during the summer months. She said she drove two trips per day, five days a week, and her total driving time each day was approximately three hours. Much of appellant's route was on unpaved roads which were bumpy; the seat cushion in her bus was very flat; and, the bus was an older model with a standard transmission and a clutch. Appellant said she experienced sudden pain towards the end of an afternoon run sometime during the first week of (date of injury). She returned to the bus barn at about 4:45 p.m. and did not report the pain to anyone nor seek medical attention. She "was in bad pain" but thought she had just pulled a muscle and didn't then know that driving the bus may have caused her pain. She drove the bus the following day and completed the remaining 15 days of her contract with the exception of two days when she was bedridden.

Appellant testified she told her supervisor, Mr. L, about the trouble with her back about a week after the pain incident occurred. She said "I told him I thought the bus had done something with my back; that every time I got in that bus the pain was still there going down those bumpy roads; that I thought the bus might have something to do with it." She stated she wasn't sure about it, however, and that Mr. L's only response was that he hoped she got to feeling better. She described Mr. L as sympathetic but noncommittal and taking it "very lightly". The next time she talked to Mr. L about her back was on either May 24th or 25th when her neighbor, Ms. P, drove her to the high school to pick up her paycheck. At that time appellant testified she again told Mr. L she thought the bus had hurt her back and thought it was work related because her back hadn't gotten better. She said she told him

she needed to see a doctor because her back wasn't any better, that she needed to get something done about it. She said his response was "like it went in one ear and out the other. It didn't seem to click with him." Appellant testified that when the pain had not resolved by May 24th she felt the problem was work related and caused by "the bus, the route, something." Appellant's friend and neighbor, Ms. P, provided testimony and an affidavit to the effect that she drove appellant to the school on or about May 24th to get her check. Ms. P stated that she sat outside Mr. L's office and overheard appellant tell him that she thought the rough route and use of the clutch was causing her severe back pain and that appellant wasn't sure she could continue driving her route. According to Ms. P, Mr. L seemed to treat appellant's complaint as a mere passing conversation.

Appellant first sought medical attention, at her own expense, on July 9, 1991, when she was seen by Dr. B for severe pain in her upper left leg and lower back. Appellant said she figured her back pain was work related by May 24th and felt Employer should be paying for Dr. B. Dr. B's records stated that appellant first noticed the pain two months earlier and contained the statement "unknown cause, started two weeks before school was out." Appellant testified that while she provided answers to Dr. B's questions she never told him the cause was "unknown" to her and surmised such was his interpretation of her responses. Appellant maintained throughout her testimony that she knew sometime in May that her leg and back pain were related to her driving the school bus.

After four treatments by Dr. B, appellant was treated three times by Dr. F commencing on July 31, 1991. Dr. F testified that appellant provided a history of pain since before school let out in (date of injury) and told him driving the bus hurt her back. However, appellant didn't indicate she had a workers' compensation claim nor did Dr. F relate to her problem as a workers' compensation matter. Nothwithstanding her repeated testimony that she knew by May 24th that her pain was caused by driving her old standard shift bus on a bumpy route, appellant also testified she first found out or knew it was work related when she discussed it with Dr. F on July 31st.

Dr. F's diagnosis was "lumbar plexus disorder" which meant appellant's discs, nerves, and muscles were irritated. He also said her scoliosis and asymmetrical facets were a contributing factor to her pain. Dr. F was accepted as an expert witness and stated his opinion that appellant had a repetitive trauma injury which must have been caused by her driving the school bus absent any history of injuries. He said he could not put a date on appellant's repetitive trauma injury given the gradual onset of the problem.

Appellant visited the orthopedic clinic at the (medical center) on August 7, 1991, because she felt she wasn't improving. She was examined, tested, and treated by various doctors at that facility throughout the August-November 1991 period. One of those doctors, a Dr. A, suggested when talking to her that appellant fill out a workers' compensation claim. Appellant hadn't realized she needed to fill out such a claim until Dr. A mentioned it to her.

In early September 1991, appellant, acting upon the suggestion of Dr. A, talked to

the school secretary, Ms. H, about filing a worker's compensation claim. Ms. H obtained the information from Appellant to complete the Employer's First Report of Injury or Illness (TWCC-1). Although the TWCC-1 was dated September 26, 1991, the information from appellant was obtained earlier that month, apparently during the first week. At about that same time in early September appellant also filed applications for unemployment benefits with the Texas Employment Commission and for disability benefits through the Social Security Administration. The TWCC-1 showed the date of injury as (date of injury), with the accompanying comment that "employee mentioned she was experiencing back pain, but made no indication it was due to a work related accident. She was not aware of this possibility until her Dr. made the suggestion."

Mr. L testified that appellant's first contact with him regarding her injury was sometime in September 1991. He said appellant had talked to him sometime in May about wanting another bus route due to her having the longest route. He could not recall appellant coming in to pick up her check nor reporting any injury to him on or about May 24th. He said he was familiar with employees' workers' compensation claims since he was the supervisor of all the high school's non-professional staff but admitted he had not previously been involved with a repetitive trauma injury claim. He insisted appellant had made no complaint to him of a work-related injury prior to her discussion with Ms. H in early September and said he would recognize he was being notified of a work-related injury were one presented as such. Mr. L also provided a written statement indicating that appellant's coworkers, five of whom were bus drivers, were questioned about their knowledge of appellant's having an injury or accident during the month of (date of injury). None had any such knowledge.

Ms. H provided both a statement and testimony to the effect that appellant came to her office in September 1991, said she had had back trouble for some time and that a doctor had suggested it was work related and that she needed to fill out a form. Ms. H obtained the information from appellant to complete the TWCC-1. She said the comment on the TWCC-1 referred to the fact that appellant wasn't aware her injury was work-related until her doctor made the suggestion. Ms. H understood from her discussion with appellant that appellant had not earlier reported her problem as a work-related injury because she didn't realize it until her doctor suggested it.

Appellant, called for rebuttal testimony, again iterated that she did report her injury to Mr. L in (date of injury), that she didn't know a form had to be filled out until the doctor suggested it, and that she thought all she had to do was just tell Mr. L which she insisted she did in (date of injury).

The challenged findings and conclusion of the hearing officer are set forth below:

FINDING NO. 6:The Claimant's testimony concerning the date she knew or should have known that her injury may have been related to her employment is contradictory and inconsistent.

FINDING NO. 7:The Claimant knew the injury may have been related to her employment sometime between (date of injury) and July 31, 1991. The Claimant testified to several possible dates during this time period.

FINDING NO. 8:The Claimant's cause of injury was unknown as of July 9, 1991.

FINDING NO. 9:The Claimant failed to establish the date of injury, as defined in Article 8308-4.14; therefore, she could not establish timely notice, not later than thirty (30) days after the date of injury.

FINDING NO. 10:The Claimant could not give "notice of injury" in May when the cause of her injury was "unknown" in July.

CONCLUSION NO. 3:The Claimant failed to give timely "notice of injury" as required by Article 8308-5.01(a), or establish "good cause" for failure to give timely notice as allowed in Article 8308-5.02(2).

The hearing officer admitted two "Disputed Issue" pages from the Benefit Review Conference Report which framed the disputed issues for the contested case hearing. With regard to the timely notice of injury issue, the exhibit stated the unresolved issue thusly: "Did claimant report an injury to her supervisor within 30 days from May 6, 1991?" According to this exhibit, appellant took the position at the benefit review conference that she reported a work related injury to her supervisor during the first or second week of (date of injury) while respondent's position was that appellant's first notice was not provided until September 26, 1991. At the hearing the parties agreed with the timely notice issue as stated by the hearing officer, to wit: did appellant report her injury within 30 days after the date of the "accident." They declined the opportunity to elaborate on that statement of the disputed issue. Nonetheless, in his Decision and Order, the hearing officer included a specific finding that appellant presented insufficient evidence to establish good cause for her failure to provide timely notice of her injury and reached a similar legal conclusion. While Article 8308-5.02(2) does indeed permit a claimant to show good cause for an untimely reporting of an injury to the employer, no such disputed issue of good cause was brought to the contested case hearing by the parties nor was that theory espoused by appellant at the hearing. Neither party has appealed from the finding and conclusion concerning good cause and we do not find the hearing officer's attempt to enlarge the disputed issue on timely notice to require any action on our part. We previously determined that a similar finding and conclusion were superfluous. See Texas Workers' Compensation Commission Appeal No. 92044 (Docket No. CC/91-090988/01-CC-CC41) decided March 23, 1992.

An employee is required to notify the employer of an injury not later than the 30th day after the date on which the injury occurs. If an injury is an occupational disease, which includes repetitive trauma injury (Article 8308-1.03(36)), the employee shall notify the employer not later than the 30th day after the date on which the employee knew or should have known that the injury may be related to the employment. Article 8308-5.01(a); Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §122.1 (TWCC Rules). Failure to notify the employer relieves the employer and the employer's insurance carrier of liability under the 1989 Act unless one or more of three exceptions, not here pursued by appellant, are established. The date of injury in the case of an occupational disease is the date on which the employee knew or should have known that the disease maybe related to the employment. Article 8308-4.14.

Article 8308-6.34(e) provides that the hearing officer is the sole judge of the weight and credibility to be given the evidence. While his Finding No. 6 in this case concerning appellant's credibility was unnecessary and inappropriate, it was supported by the evidence.

We find that Finding No. 7 is supported by probative evidence. Appellant testified that after the incident of sharp pain on the afternoon in early (date of injury), she suspected it was caused by her driving the bus and so advised Mr. L sometime later in May, and again on or about May 24th when she came to his office to pick up her paycheck. Appellant repeatedly testified that she knew her back injury was related to her work by May 24th. She also testified that when she saw Dr. B on July 9th she told him she drove a school bus and told him the only thing she could think of as the cause of her problem was driving the bus. When she saw Dr. F on July 31st, although she didn't state it in terms of a workers' compensation matter, she did tell Dr. F that driving the bus hurt her back. This finding of fact that appellant knew sometime between (date of injury and July 31st that her injury may have been related to her employment is amply supported by the evidence and provides factual support for the challenged conclusion of law that appellant failed to provide her employer with notice of her injury within the time required by Article 8308-5.01(a). *Compare* Texas Workers' Compensation Commission Appeal No. 91026 (Docket No. EP-00003-91-CC-1) decided October 18, 1991.

Given Findings Nos. 6 and 7 and his legal conclusion, the hearing officer obviously accepted the testimony of Mr. L that whatever comments appellant may have made to him in (date of injury) about the pain in her back and her bus and route, such comments did not provide him with notice of her injury and that appellant did not provide notice to her employer prior to early September 1991. *Compare* Appeal No. 92044, *supra*. We will therefore imply the finding that the appellant provided employer with notice of her injury in September 1991. We have previously observed that the purpose of the notice provision is to give the insurer an opportunity to immediately investigate the facts and that the employer need only be advised of the general nature of the injury and the fact that it is job related. Where, as here, an employee testifies that a supervisor was notified of a work related injury but the supervisor testifies to the contrary, a fact question is created to be resolved by the hearing

officer. Texas Workers' Compensation Commission Appeal No. 91066 (Docket No. AM-A121175-01-CC-LB41) decided December 4, 1991.

The hearing officer made Findings Nos. 8 and 10 to the effect that appellant's cause of injury was "unknown" as of July 9, 1991, and that she could not give notice of injury in May when the cause of her injury was "unknown" in July. These findings are somewhat confusing. Finding No. 8 may have been made to address the element of causation in determining that appellant did sustain a compensable repetitive trauma injury which, of course, has not been challenged on appeal. It may also have been made, as it appears that Finding No. 10 was made, to provide an underlying factual basis to support the conclusion that appellant did not provide employer with timely notice of her injury. These findings are supported by the medical records of Dr. B which contained the reference to the cause of injury as "unknown" as of July 9th, the date appellant first visited Dr. B. Appellant testified that Dr. B must have drawn that conclusion from her responses to his questions about not having been in an accident and not being able to identify some specific traumatic event. However she did tell him her back pain came from driving the bus. While confusing and superfluous, Findings Nos. 8 and 10 are not inconsistent with the challenged legal conclusion. We have previously held that, in the proper set of circumstances, unnecessary findings may be appropriately disregarded. *See* Texas Workers' Compensation Appeal No. 92088 (Docket No. 064653101-CC-AU41) decided April 21, 1992.

Finding No. 9, however, is more problematical in that, on its face, it appears to contradict Finding No. 7 that at sometime between (date of injury) and July 31st appellant did know her injury may be job related. As we have said, the latter finding was amply supported by the evidence and it is apparent that the hearing officer accepted Mr. L's testimony that the first notice of injury was not provided to Employer before September 1991. We have implied such a finding. Article 8308-4.14 provides that the date of injury for an occupational disease is the date on which the employee knew or should have known the disease may be related to the employment. What the hearing officer seems to be attempting to say with Findings Nos.7 and 9 is that while appellant did know on some date between (date of injury)st and July 31st that her injury may have been related to her employment (the 30-day trigger date), she didn't actually establish one particular date, for example, some date before May 24th, or May 24th, or July 9th, or July 31st, because of her varying testimony. Thus, while appellant knew at least by July 31st that her injury may be related to her employment, she didn't provide notice until early September, clearly beyond the 30 day period. Such reasoning gives appellant the benefit of the doubt that she acquired such knowledge as late as July 31st and not on the May 24th date to which she repeatedly testified. These findings would have been less facially confusing, inconsistent, and apparently self-contradictory had the hearing officer omitted Finding No. 9 and gone on to make the specific finding that appellant actually did provide notice to Employer in September 1991. However, we do not find that Finding No. 9 fatally undermines the validity of the challenged conclusion when read with the other factual findings. Such factual findings should be read as a whole and given a reasonable rather than technical construction and conflicts or contradictions among them that are more apparent than real may be

disregarded. Texas Indemnity Ins. Co. v. Staggs, 134 Tex. 318, 134 S.W.2d 1026, 1030 (Texas Comm'n App. 1940, opinion adopted).

When reviewing a hearing officer's findings for factual sufficiency of the evidence, we consider and weigh all the evidence and do not disturb such findings unless they are so contrary to the overwhelming weight of the evidence as to be wrong and unjust. Cain v. Bain, 709 S.W.2d 175,176 (Tex. 1986). We recognize it is the function of the fact finder, here the hearing officer, to judge the credibility of the witnesses, assign the weight to be given their testimony, and resolve any conflicts or inconsistencies in the testimony. We will not substitute our judgment for that of the hearing officer where, as here, the challenged findings are supported by some evidence of probative value and are not against the great weight and preponderance of the evidence. Texas Employers' Insurance Association v. Alcantara, 764 S.W. 2d 865, 868 (Tex. App. - Texarkana, 1989, no writ). The hearing officer's findings and conclusion are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W. 2d 660 (1951); Pool v. Ford Motor Co., 715 S.W. 2d 629, 635 (Tex. 1986)

The decision of the hearing officer is affirmed.

_____
Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Joe Sebesta
Appeals Judge